

Separate and apart from the above recited "archival record" problem, such statement by the examiner begs the question of what exactly does this reference of Harry's teach? And exactly what product is being called upon to rely on as prior art?

Namely does this reference teach what the examiner says it does now (i.e. in Dec. of 2003)? Clearly by his own admission he had formed an incorrect conclusion as to what the reference taught. And clearly this conclusion was based upon those records that existed at the USPTO during the prosecution of this patent application which began in the 2000.

Clearly the original abstract supplied by the USPTO and relied upon by the applicant and his attorney is all that anyone had to go on at that point. Such PTO records during the recent prosecution of this patent application were clearly inadequate to form an adequate teaching of what that reference stands for since clearly an expert, such as a PTO examiner in the relevant art formed an incorrect conclusion as to the nature of that reference.

Clearly the incorrect reading of this reference necessitates at least a presumption that the reference in question is not an enabling reference on its face. As a legal conclusion such a reference cannot stand for what is state or the art, nor can it stand for what is prior art. And such a presumption should have to be overcome by some sort of burden meeting requirement, such as an affidavit of an expert attesting to the state of the art; what product was actually produced by Harry's, if any? What did he read the reference to mean to him as an expert?

We are also troubled by the notion that the examiner cites recent ruling of the PTO Board giving little to no weight to such Dialogue Abstracts and clearly the above recited comedy of errors simply highlight this problem that the Board's recent conclusion seems to be concerned with. However, it is a little troubling to have the Board's decision seemingly resonate to little effect, when in fact the examiner can take the clearly inadequate Dialogue Abstract and then cure its inadequacies by attesting to what the reference is supposed to mean. When in fact it did not mean that at all to the examiner upon his reading of the reference.

Furthermore on page 3, the applicant does not admit that souffle' cups are "notoriously old," in the art. Such applicant has admitted to their prior use but has made no averment as to what is notoriously old." Furthermore, we would ask what sort of weight is being accorded to the term: "Notoriously old," in the examiner's remarks on page 3 of the office action. For instance, is there some higher standard of burden of proof that is needed by the applicant? We use this merely as example and offer no opinion on what is meant by this term.

We ask this as a matter of which law is being relied upon to govern the issue of obviousness. If the examiner is proceeding on a "notoriously old" standard upon which to give credence to the prior art then such a legal conclusion should at least be made on the record so the applicant may adequately respond to this ground of rejection.

Further to this argument, we ask that the examiner state with clarity which reference(es) are being relied upon for the conclusion that "to substitute one conventional cup...for another cup....would have been obvious?" (see examiner's remarks on page 3 of the action). We take it from our reading of page 3, that the examiner is relying upon the applicant's own admissions for this proposition. We do not believe, upon our recollection and belief, that we have referred to anything as "notoriously" old in the art.

There is nothing in the teaching of the prior art (including such art as in this case file) to suggest the substitution of soufflé cups for other types of packages in the prior art. Nor do applicant's own statements re: the prior art suggest or imply or state that such teaching of the substitution is obvious.

Whether soufflé' cups are conventional (a factual issue upon which we offer no conclusion at the moment) does not in fact tell us whether it would be obvious to substitute such cups for other condiment packages in the prior art. There is no suggestion in the prior art of record that would teach that is advantageous or desirable to do so.

Merely the fact that such a substitution may be possible due to prior use of the cups, does not teach that the substitution is desirable or preferable. This is clearly an underlying legal principle involved here, that is well documented in the rulings of the courts as well as Patent Board.

Nor do we agree that the Vanderhurst reference contains any suggestion that soufflé cups maybe substituted for other packages possibly used in prior art when. (see page 3 and 4 of the action). The use of soufflé cups creates unforeseen results such as the ready ability to support the salsa/condiment in an up standing container (such as the soufflé' cup). Such a result cannot be had by the use of conventional packaging possibly used in the prior art.

Nor would we agree that reference to Snack World and the USDA stand for the proposition that this substitution is preferable or desirable to one skilled in the art. Again, we state this position not knowing exactly which prior art the examiner is relying upon for the proposition that the substitution of cups for packets is obvious. As stated above, we desire a clarification of this issue as to what reference is being said to stand for this teaching.

On page 2, line 14 of the office action; it is not understood what is meant by:

"...one big held the loose chips and a cup of salsa."


May have a clarification of this statement of the examiner's?

Also, the undersigned does not see a copy of reference U in my file or my fax. Since this reference is apparently a new discovered reference (see examiners remarks on page 2, lines 11-12 of the recent office action: "a full copy of Reference U has been obtained.")

We would like a copy of it for our records and to formulate further response thereto as issues become developed in the case.

The examiner refers to Harry's Premium Snacks on page 2 of the reference but we do not see this reference listed either on the recent notice of references cited or the reference literature that accompanied the examiners fax of 8/14/04 (sending us the copy of the office action.). We do see a company and literature for Nally's Fine Foods, but the undersigned is a little confused on which reference and/or reference number go with the "Harry's premium Snacks" being referred to on page 2?

Sincerely,


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